UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 41

Docket Nos. CH-1221-11-0466-W-1
CH-0432-11-0182-R-1

Peter J. Agoranos,

Appellant,

v.

Department of Justice,

Agency.

June 7, 2013

Phillip A. Turner, Esquire, Chicago, Illinois, for the appellant.

Ellen L. Harrison, Esquire, and Lasagne A. Wilhite, Springfield, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that denied his request for corrective action in an individual right of action (IRA) appeal (MSPB Docket No. CH-1221-11-0466-W-1). For the reasons set forth below, we AFFIRM, in part, VACATE, in part, the initial decision, and REMAND the appeal for further adjudication. We also REOPEN the appellant's removal appeal (MSPB Docket No. CH-0432-11-0182-I-1) under 5 C.F.R. § 1201.118, and REMAND the removal appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, a GS-12 Intelligence Research Specialist with the Drug Enforcement Administration, filed a whistleblower complaint, as amended, with the Office of Special Counsel (OSC) alleging that in retaliation for three disclosures, the agency took the following personnel actions: (1) Reassignment in 2006; (2) recommendation for a psychiatric examination in May or June 2007; (3) non-selection for 31 requests for transfer between September 2007 and June 2009; (4) receipt of three unfavorable performance appraisals for fiscal years 2008, 2009, and 2010; (5) denial of a Within Grade Increase (WIGI); (6) placement on a performance improvement plan (PIP) in February 2009; and (7) removal for unacceptable performance in November 2010. MSPB Docket No. CH-1221-11-0466-W-1 Initial Appeal File (IAF-W), Tab 1.

¶3 On November 29, 2010, the appellant filed a Board appeal of his removal; the matter was docketed by the regional office as MSPB Docket No. CH-0432-11-0182-I-1. On his appeal form,[1] the appellant checked the box indicating that he was alleging reprisal for whistleblowing and noted that he had filed a complaint with OSC, but that OSC had not yet issued a determination letter. MSPB Docket No. CH-0432-11-0182-I-1 Initial Appeal File (IAF-I), Tab 1 at 5. In an attachment to his appeal, the appellant explained that, in reprisal for making three alleged protected disclosures, the agency denied his requests for transfers, gave him poor performance ratings, denied him a WIGI, and removed him. *Id*. at 8-9.

¶4 In the acknowledgment order, the administrative judge provided the appellant with the jurisdictional notice for an IRA appeal and ordered him to file evidence and argument to prove that the Board has jurisdiction over his appeal under *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). IAF-I, Tab 2 at 2-3. In response, the appellant submitted various

[1] The appellant also checked the box indicating that he was raising an affirmative defense of harmful procedural error. IAF-I, Tab 1.

documents, including a December 16, 2010 OSC closure letter. IAF-I, Tab 6; *see id.*, Exhibit B.

¶5 On April 1, 2011, the administrative judge held a telephonic status conference. IAF-I, Tab 18. During the conference, the appellant stated that he was not only challenging the removal action, but also the denial of a WIGI, the denial of transfers, and his unacceptable performance ratings, and that he intended to file an IRA appeal within the next week. *Id.* at 1-2. The administrative judge informed the appellant that the aforementioned personnel actions could be incorporated into an IRA appeal as long as those actions were specifically raised before OSC. *Id.* at 2. Further, the administrative judge explained that "should the appellant wish to keep the removal appeal separate from the IRA appeal, [he] would join the appeals. The agency would then be required to prove the removal action by substantial evidence and the whistleblowing allegation would be heard as an affirmative defense." *Id*. at 3.

¶6 Seven days after the April 1, 2011 status conference, the appellant filed a separate IRA appeal. IAF-W, Tab 1. On May 23, 2011, the administrative judge subsequently issued an initial decision that dismissed the appellant's removal appeal; he stated that the appellant expressed a desire "to have his challenge to the removal action incorporated within the IRA request for corrective action." IAF-I, Tab 21 at 2.

¶7 In his IRA appeal, the appellant alleged that he made the following disclosures: (1) In March 2004, he informed Group Supervisor Lynette Georgevich that co-workers bet on the date a co-worker's baby would be born, IAF-W, Tab 1 at 43; (2) in May 2005, he informed Georgevich that co-workers worked on a private construction contract while on government time, *id.* at 46-47; and (3) in February 2007, he disclosed to Assistant Special Agent in Charge Timothy McCormick that coworkers participated in a Super Bowl betting pool, *id.* at 6, 50. The appellant contended that, in reprisal for making these alleged protected disclosures, the agency: (1) reassigned him to another group in 2006,

id. at 47; (2) recommended that he receive a psychiatric examination in May or June 2007, *id.* at 52; (3) did not select him for 33 positions involving lateral transfers between September 2007 and June 2009,[2] *id.* at 6; (4) gave him unacceptable performance ratings on his evaluations for fiscal years (FYs) 2008, 2009, and 2010, *id.* at 7; (5) denied him a WIGI, *id.*; (6) placed him on a PIP in February 2009, *id.*; and (7) removed him in November 2010, *id.*

¶8 The administrative judge issued an IRA jurisdictional order and a separate IRA timeliness order.[3] IAF-W, Tabs 2, 3. The appellant responded to both orders. IAF-W, Tabs 7, 8. The agency moved to dismiss the IRA appeal as untimely filed and for lack of jurisdiction. IAF-W, Tabs 9, 12. The administrative judge denied the agency's motions, finding that the appellant proved Board jurisdiction over his IRA appeal and that the appellant timely filed his IRA appeal. IAF-W, Tabs 10, 17. Regarding the timeliness issue, the administrative judge determined that the appellant effectively filed an IRA appeal on December 21, 2010, when the appellant responded to the Board's December 6, 2010 acknowledgment order in MSPB Docket No. CH-0432-11-0182-I-1, informed the Board of OSC's December 16, 2010 closure letter, and stated that his appeal was now properly before the Board. IAF-W, Tab 10 at 1-2; *see* IAF-I, Tab 6 at 4-5, Exhibit B. The administrative judge reasoned that the December 21, 2010 filing should have been docketed as an IRA appeal, and that the appellant

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[2] In the agency's prehearing submission, the agency states that the appellant clarified during his deposition that he applied for 31 positions, not 33 positions as alleged in his initial appeal. IAF-W, Tab 34 at 4 n.8. From our review of the appellant's submissions in the W-1 appeal file, it does not appear that the appellant disputed this clarification by the agency, or continued to allege that he was not selected for 33 positions.

[3] We note that the administrative judge informed the appellant that, if he untimely filed his IRA appeal, he must show that good cause exists for the filing delay. IAF-W, Tab 3 at 2-3. However, the Board has no authority to excuse an untimely filed IRA appeal. *See* 5 U.S.C. § 1214(a)(3)(A)(ii) and 5 C.F.R. § 1209.5(a)(2); *see also King v. Department of the Air Force*, 116 M.S.P.R. 423, ¶ 8 (2011). The administrative judge did, however, correctly state the law in his May 9, 2011 summary of conference call. IAF-I, Tab 20.

should not be held responsible for the Board's failure to docket an IRA appeal at that time. IAF-W, Tab 10 at 2.

¶9 After holding a hearing in the IRA appeal, the administrative judge denied the appellant's request for corrective action under the Whistleblower Protection Act (WPA). IAF-W, Tab 43, Initial Decision (ID) at 1, 13. The administrative judge did not consider the appellant's affirmative defenses of denial of due process and harmful procedural error because such arguments are not within the Board's jurisdiction in an IRA appeal.

¶10 The appellant has filed a petition for review of the initial decision arguing that the administrative judge committed several procedural and adjudicatory errors. Petition for Review (PFR) File, Tab 1. The agency has filed a response to the appellant's petition for review. *Id.*, Tab 3.

ANALYSIS

The administrative judge properly found that the IRA appeal was effectively filed on December 21, 2010, and thus was timely filed.

¶11 Under 5 U.S.C. § 1214(a)(3)(A)(ii) and 5 C.F.R. § 1209.5(a)(1), the appellant's deadline for filing an IRA appeal fell on February 22, 2011, 65 days after OSC issued its December 16, 2010 closure letter.[4] *See* IAF-I, Tab 6, Exhibit B. Here, the record reflects that the appellant filed his IRA appeal on April 8, 2011. IAF-W, Tab 1. Thus, it appears that the IRA appeal was filed 45 days late.

¶12 However, as set forth above, the administrative judge found that the appellant's December 21, 2010 filing, which came just days after OSC's closure letter and was filed in response to the administrative judge's IRA jurisdictional order, should have been docketed as an IRA appeal, and that the appellant should

[4] Because the deadline fell on Saturday, February 19, and because Monday, February 21 was a Federal holiday, the deadline fell on the next business day, Tuesday, February 22. *See* 5 C.F.R. § 1201.23.

not be harmed by the regional office's error. *See* IAF-W, Tab 10 at 2. Although the agency moved for the administrative judge to dismiss the IRA appeal as untimely filed, the agency did not object to the administrative judge's ruling, and does not raise the issue on review. IAF-W, Tab 9; *see* PFR File, Tab 3. Thus, we discern no reason to disturb the administrative judge's finding that the IRA appeal was timely filed.

The appellant's election to seek corrective action before OSC was not a binding election and did not preclude his removal appeal.

¶13 It is well established that the appellate jurisdiction of the Board may be limited if a negotiated grievance procedure established pursuant to a collective bargaining agreement is in effect between the agency and its employees. *See* 5 U.S.C. § 7121(a)(1); *Greer v. Housing and Urban Development*, 19 M.S.P.R. 90, 92 (1984). However, § 7121 contains three provisions giving employees other options with regard to avenues of relief other than the negotiated grievance procedure for certain personnel actions. Specifically, where an employee is affected by an action that is otherwise exclusively committed to the negotiated grievance procedure under § 7121(a)(1), but that may also be a prohibited personnel practice under section 2302(b)(1), i.e., unlawful discrimination, the employee may "raise the matter under a statutory procedure or the negotiated procedure, but not both." 5 U.S.C. § 7121(d)(1). Similarly, with regard to matters covered under sections 4303 and 7512, which are also covered by a negotiated grievance procedure, the employee may elect to pursue the contractual remedy or relief through the Board's appellate procedures, but not both. 5 U.S.C. § 7121(e)(1). In both instances, whichever remedy is sought first by an aggrieved employee is deemed an election of that procedure and precludes pursuing the matter in either of the other two forums.

¶14 The third alternative avenue of relief, which is applicable in this appeal, provides that pursuant to the 1994 amendments to the WPA, an employee who has

been subjected to an action appealable to the Board and who alleges that he has been affected by a prohibited personnel practice other than a claim of discrimination under § 2302(b)(1), may elect to pursue a remedy through one, and only one, of the following remedial processes: (1) an appeal to the Board under 5 U.S.C. § 7701; (2) a grievance filed pursuant to the provisions of the negotiated grievance procedure; or (3) a complaint following the procedures for seeking corrective action from OSC under 5 U.S.C. §§ 1211-1222. *See* 5 U.S.C. §7121(g); *King v. Department of the Air Force*, 116 M.S.P.R. 423, ¶ 8 (2011). Again, whichever remedy is sought first by an aggrieved employee is deemed an election of that procedure and precludes pursuing the matter in either of the other two forums. *Feiertag v. Department of the Army*, 80 M.S.P.R. 264, ¶ 5 (1998).

¶15 For matters arising under §§ 7121(d) and (e), the Board has long held in appeals that an agency's failure to provide proper notice of the "potential avenues of recourse" and of the limitations on those rights precludes finding that the employee has made a knowing and informed election and thus renders it invalid. *See e.g., Johnson v. Department of Labor*, 26 M.S.P.R. 447, 450 (1985) (RIF notice deficient insofar as it failed to notify employee of right to pursue statutory procedures where allegation of discrimination is made, and employee's subsequent filing of grievance was not an informed election such as to deprive the Board of jurisdiction); *Blanshan v. Department of the Air Force*, 23 M.S.P.R. 84, 86 (1984) (same); *Miyai v. Department of Transportation*, 32 M.S.P.R. 15, 20 (1986) (fact that employee first filed grievance over agency's putting him on enforced leave did not preclude Board jurisdiction over his suspension where agency failed to notify him of his right to file an appeal or any limitations on that right).

¶16 However, in *Feiertag*, the Board departed from this longstanding approach of enforcing only a knowing and informed election of remedies when it held that an election of remedies made pursuant to 5 U.S.C. § 7121(g) is binding regardless of whether the "individual is aware of all of his options, and of the

effect that pursuing a particular option will have on his ability to pursue other options." 80 M.S.P.R. 264, ¶ 7. The Board explained the decision by saying that nothing in the WPA amendments or legislative history indicates that only a knowing and informed election under that section is binding. However, the Board offered no explanation for construing the election provision in § 7121(g) so radically differently from those in §§ 7121(d) and (e) which likewise contain no express requirement that an election made thereunder be knowing and informed. We note that *Feiertag* is factually distinguishable from *Johnson*, *Blanshan*, and *Miyai*, because the personnel action at issue there was a 6-day suspension without pay, which is not an adverse action appealable to the Board under 5 U.S.C., chapter 75. *Feiertag*, 80 M.S.P.R. 264, ¶ 2. Thus, the Board may have been reluctant to extend the "knowing and informed" requirement to elections under § 7121(g) because of the resulting burden on agencies to issue notice of election rights in effecting even relatively minor personnel actions. In any event, we discern no basis upon which to conclude that Congress intended that the election of remedies requirement in one section of § 7121 have an entirely different meaning in another section of the very same provision. Rather, consistent with the general rules of statutory construction, we can presume that, in adding 5 U.S.C. § 7121(g), Congress was aware of the Board's interpretation of §§ 7121(d) and (e) as requiring that any election thereunder be knowing and informed in order to be enforceable. *Cf. Benifield v. U.S. Postal Service*, 40 M.S.P.R. 50, 53 (1989). If Congress had intended that a different interpretation be given to an election under § 7121(g), it could have expressed that intention when it enacted the amendments. *Id.* Its failure to do so supports the conclusion that Congress intended to extend the Board's requirement of a knowing and informed election of remedies to § 7121(g). *Id.* Such a conclusion is further buttressed by the fact that, in amending § 7121(a)(1) to note the

addition of § 7121(g), Congress framed the elections under the three sections as equivalent exceptions to the exclusivity of negotiated grievance procedures.[5] Accordingly, we overrule *Feiertag* to the extent that it applies a different rule to all elections under § 7121(g). Specifically, we now hold that for adverse actions appealable to the Board under 5 U.S.C. §§ 4303 and 7512, an employee's election of remedies under subsection (g) must be knowing and informed, and, if it is not, it will not be binding upon the employee.[6]

¶17 Here, the undisputed record evidence shows that, before filing an appeal with the Board, the appellant filed a complaint with OSC alleging that the agency denied him a WIGI, and that he amended his complaint to allege that he was removed in reprisal for his whistleblowing. IAF-I, Tab 19 at 4-10. However, the agency removed the appellant without notifying him of his right to file a request for corrective action with OSC under subchapters II and III of chapter 12 of title 5 and without notifying him of the effect that such an election would have on his appeal rights before the Board. *Id.*, Tab 17, Subtab 4E. Accordingly, we find that the appellant's filing of the OSC complaint did not constitute a valid, informed election under 5 U.S.C. § 7121. Therefore, he was not precluded from filing a subsequent appeal of his removal, and he was not restricted to the issues within the scope of an IRA appeal.

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[5] Section 7121(a)(1) states: "Except as provide in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage." (Emphasis added).

[6] However, for personnel actions that are not covered under 5 U.S.C. chapters 43 or 75, but for which the statute affords a remedy as contemplated under § 7121(g), we do not suggest that an agency has any statutory obligation with regard to issuing notice of appeal rights. Rather, as reflected in our new regulations, when an agency takes an action against an employee that is directly appealable to the Board, it must provide notice of the avenues of relief available to the employee and of the preclusive effect of first filing on the other remedial options. *See* 5 C.F.R. § 1201.21(d).

¶18 The agency contends on review that the appellant made a "strategic choice" before the administrative judge to forgo his rights under chapter 43 and to limit his appeal to one seeking corrective action for whistleblower retaliation. PFR File, Tab 3 at 9-11. However, the record does not show that the appellant received any notice that the consolidation of his appeals would result in the waiver or loss of any his claims for relief from his removal appeal. At the time the appellant requested dismissal of his removal appeal, Board precedent stated that when an individual who was affected by an action that is directly appealable to the Board chooses to file a whistleblower retaliation complaint with OSC, the jurisdictional basis of any later appeal to the Board is the authority under which the agency took the personnel action, not 5 U.S.C. § 1221. *Massimino v. Department of Veterans Affairs*, 58 M.S.P.R. 318, 323 (1993). This precedent further held that the scope of such an appeal is not limited to whistleblower retaliation as an IRA is, but instead includes all issues that could have been adjudicated had the individual appealed directly to the Board (*e.g.*, the merits of the personnel action, which the agency bears the burden of proving; denial of due process; discrimination; harmful procedural error; other prohibited personnel practices). *Id.*; *see* 5 U.S.C. § 7701(c). In 1994, over one year after the Board decided *Massimino*, Congress enacted amendments to the WPA that added 5 U.S.C. § 7121(g). Pub. L. No. 103-424, § 9(b), 108 Stat. 4365. *Massimino* was thus abrogated by statute, but the Board erroneously continued to follow *Massimino*. *See, e.g.*, *Calvetti v. Department of the Air Force*, 107 M.S.P.R. 480, ¶ 4 n.1 (2007). Accordingly, even though the express language of 5 U.S.C. § 7121(g) negates the holding in *Massimino*, the appellant and his counsel could have reasonably relied upon the *Massimino* holding in concluding that the appellant was not waiving any of his affirmative defenses when he requested to withdraw his removal appeal.[7] Under similar circumstances, the Board has found

[7] Our new regulations make clear that in an IRA appeal, the only issues before the

that an appellant who has exercised due diligence should be permitted to reopen a withdrawn removal appeal and to proceed with the adjudication of his appeal under 5 U.S.C. § 7701. *See King*, 116 M.S.P.R. 423, ¶ 12; *Shannon v. Department of Homeland Security*, 100 M.S.P.R. 629, ¶ 9 (2005) (Board reopened an appeal where the appellant withdrew the appeal based on representations of the administrative judge that he could pursue his claim of reprisal for whistleblowing with OSC). We therefore reopen the appellant's chapter 43 removal appeal and remand it to the Chicago Regional Office for adjudication on the merits.

The appellant has not shown error in the administrative judge's findings that he did not make a protected disclosure regarding the baby birth date pool.

¶19 On review, the appellant disagrees with the administrative judge's finding that he failed to prove that he made the baby betting pool disclosure to his former group supervisor. PFR File, Tab 1 at 14-15. For example, he argues that his former group supervisor did not state that he did not make a disclosure to her - she stated that she did not recall a disclosure. *Id.* The appellant also asserts that none of the administrative judge's credibility determinations are based on the demeanor of the witnesses. *Id*. at 15. However, we have carefully considered the appellant's claims and find that his assertions do not provide a reasoned basis for disturbing the administrative judge's factual findings. *See Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 105-106 (1997) (the Board will give due deference to the credibility findings of the administrative judge, and will not grant a petition for review based on a party's mere disagreement with those findings); *Broughton v. Department of Health & Human Services*, 33 M.S.P.R. 357, 359 (1987) (same).

Board are those listed in 5 U.S.C. § 1221(e) and an appellant may not raise affirmative defenses. *See* 5 C.F.R. § 1209.2(c), effective Nov. 13, 2012. Thus, our new regulations are consistent with the statutory remedial scheme and tacitly recognize that *Massimino* was abrogated by the 1994 enactment of 5 U.S.C. § 7121(g). To remove any doubt on

We affirm the administrative judge's contributing factor findings regarding the performance related actions, but vacate his finding regarding the appellant's non-selection for 31 lateral transfers.

¶20 To prevail on a claim under the WPA, an appellant must prove by preponderant evidence that his disclosure was a contributing factor in a personnel action. 5 U.S.C. § 2302(b)(8)(A). One way to establish this criterion is the knowledge-timing test, under which an employee submits evidence showing that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *See Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 26 (2011); *Wadhwa v. Department of Veterans Affairs*, 110 M.S.P.R. 615, ¶ 12, *aff'd*, 353 F. App'x 435 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 2084 (2010). The knowledge-timing test is the most common way to prove contributing factor. *Wadhwa*, 110 M.S.P.R. 615, ¶ 12.

¶21 In its cross petition for review, the agency argues that the administrative judge erred in finding that the appellant proved that his February 2007 Super Bowl pool disclosure was a contributing factor in its decisions to give the appellant an unacceptable rating on his FY 2009 performance evaluation and to remove him in 2010. PFR File, Tab 3 at 18-21. To support its position, the agency cites *Peterson v. Department of Veterans Affairs*, 116 M.S.P.R. 113, ¶ 16 (2011), in which the Board held that personnel actions taken within 1 to 2 years of the protected disclosure satisfy the timing prong of the knowledge-timing test, and *Salinas v. Department of the Army*, 94 M.S.P.R. 54, ¶ 10 (2003), in which the Board found that the demotion action took place more than 2 years after Salinas's protected disclosure, and therefore the timing was too remote to

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the matter, we overrule *Calvetti*, 107 M.S.P.R. 480, and similar decisions that followed *Massimino* after the enactment of section 7121(g).

satisfy the knowledge-timing test. *Id.* at 19-20. Although we agree with the agency's reading of these cases, we find they are distinguishable from the case presently before us.

¶22 Unlike *Salinas* and other IRA cases in which personnel actions, independent of one another, were taken more than 2 years after the protected disclosure, this case involves related performance-based actions that form one continuous chain as the appellant alleges, or in other words a continuum. *See* PFR File, Tab 5 at 2. The Board has considered whether a personnel action that occurred more than 2 years after a protected disclosure was made was "part of a continuum of related personnel actions" in analyzing whether the knowledge-timing test applied. *See Jones v. Department of the Interior*, 74 M.S.P.R. 666, 697 (1997) (considering whether the appellant's non-selection for a promotion in 1995, approximately 6 years after his protected disclosure, was "part of a continuum of related personnel actions" in analyzing whether the knowledge-timing test applied).

¶23 Here, each of the performance based actions at issue in this IRA appeal flow from the appellant's unacceptable performance rating for FY 2008. It is undisputed that the agency issued the unacceptable performance rating for FY 2008 within 2 years of the appellant's February 2007 disclosure about the Super Bowl pool, and therefore the issuance of the appellant's FY 2008 performance evaluation occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the unacceptable performance rating. *See* IAF-I, Tab 17, subtab 4m-3; *Peterson*, 116 M.S.P.R. 113, ¶ 16. The appellant's unacceptable FY 2008 performance rating directly led to the denial of a WIGI and the decision to place the appellant on a PIP in February 2009. IAF-I, Tab 17, subtabs 4m-4, 4m-6. The appellant's subsequent failure to perform at an acceptable level while on the PIP led to the appellant's unacceptable performance rating for FY 2009, and the agency's decision to propose and ultimately remove the appellant in 2010. *Id.*, subtabs 4a, 5f. Thus, although the FY 2009 performance evaluation and the 2010 removal

action were taken more than 2 years after the appellant made his Super Bowl pool disclosure in February 2007, they are part of a continuum of related performance-based actions that commenced in December 2008. Consequently, we find that the timing prong of the knowledge-timing test has been satisfied with regard to all of the performance based actions alleged by the appellant. Thus, we AFFIRM the administrative judge's contributing factor findings regarding the performance related actions.

¶24 Regarding the appellant's non-selection for 31 lateral transfers, the administrative judge analyzed contributing factor under the knowledge-timing test and found that the selecting official was unaware of the appellant's disclosures, and therefore the appellant failed to prove that his whistleblowing was a contributing factor in the agency's non-selection for any of the 31 lateral transfers. ID at 12. The appellant disagrees with this finding and reasserts that his former supervisor influenced the selecting official's decision not to transfer him. PFR File, Tab 1 at 17-18. Although we discern no error in the administrative judge's decision to credit the selecting official's testimony that he was unaware of the appellant's whistleblowing, the unique circumstances present in this appeal necessitate that we look beyond the knowledge-timing test to determine whether the appellant's whistleblowing was a contributing factor in his non-selection for any of the lateral transfers for which he applied.

¶25 As set forth above, we agree with the administrative judge that the appellant proved that his whistleblowing was a contributing factor in the agency's decision to take the performance related actions. The administrative judge further found that the appellant's former supervisor informed the selecting official of the appellant's unacceptable performance during the PIP, and that the selecting official relied upon this information in deciding not to select the appellant for any of the lateral transfers. ID at 10, 12. Regardless of whether the selecting official knew of the appellant's whistleblowing, if the performance based actions were taken in reprisal for the appellant's whistleblowing, and the selecting official did

not select the appellant based on the appellant's poor performance appraisals and the performance related actions, the selection process may have been tainted by whistleblower reprisal. Thus, we vacate the administrative judge's finding that the appellant failed to prove that his whistleblowing was a contributing factor in his non-selection for 31 lateral transfers and remand the issue for further adjudication.

¶26 On remand, the administrative judge shall consider the totality of the circumstances, including the strength of the agency's evidence in support of the performance based actions, whether the whistleblowing disclosure was personally directed at the officials who took the performance based actions, and whether any of the officials who took the performance based actions had a desire or motive to retaliate against the appellant. *See Sparks v. Department of the Interior*, 62 M.S.P.R. 369, 372 (1994).

We remand the appeal to the regional office to make findings in accordance with *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012).

¶27 In determining whether the agency proved by clear and convincing evidence that it would have taken the same actions against the appellant, even absent any protected disclosures, the administrative judge must consider the following three factors: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of agency officials involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

¶28 However, our reviewing court recently issued guidance regarding the Board's consideration of the evidence presented by the agency in an effort to meet its clear and convincing evidence burden. *See Whitmore*, 680 F.3d 1353. In *Whitmore*, the court stated that "[e]vidence only clearly and convincingly

supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion." *Id.* at 1368. The court further determined that "[i]t is error for the [Board] to not evaluate all the pertinent evidence in determining whether an element of a claim or defense has been proven adequately." *Id.* Upon its review in *Whitmore*, the court found that the administrative judge had taken an unduly dismissive and restrictive view on the issue of the existence and strength of any motive to retaliate by the agency, *id.* at 1370-72, and that remand for further fact finding was necessary, *id.* at 1372, 1377.

¶29 Here, the administrative judge's analysis regarding the strength of the agency's evidence in support of the performance related actions was similarly inadequate. *See* ID at 10-12. The appellant alleged that he was given an unacceptable performance rating and his writing was held to a higher level of scrutiny as a result of his whistleblowing, and that the agency refused to provide him with a mentor during his PIP. *See* Hearing Transcript (HT) of the Dec. 22, 2011 hearing (12/22 HT) at 803; HT of the Dec. 20, 2011 hearing (12/20 HT) at 184-187, 191, 309, 313-14, 337; IAF-W, Tab 35 at 2. The record shows that, despite that managers noted ongoing issues regarding the appellant's performance, the appellant received an unacceptable performance rating for the first time in December 2008, 10 months after he made his protected disclosure. Further, the Field Intelligence Manager testified that the appellant's first-line supervisor was the appellant's mentor during the PIP, and "[i]t would have … [been] overkill to have a mentor as well as … the guidance that [the appellant's supervisor] was providing." 12/22 HT at 827. In only citing the agency's evidence, the initial decision does not reflect that the administrative judge considered the countervailing evidence presented by the appellant and considered the record as a whole, as required under *Whitmore*.

¶30 Further, the administrative judge concluded that the appellant failed to show a retaliatory motive on the part of the agency, focusing upon the fact the

appellant's disclosure was not aimed at any of the officials who took the personnel actions against him. *See* ID at 11. However, the appellant contended that both the Field Intelligence Manager and the appellant's former group supervisor were good friends with one of the alleged wrongdoers identified in the appellant's Super Bowl pool disclosure. *See* IAF-W, Tab 1 at 51. The record reflects that the appellant and the alleged wrongdoer were not friendly towards one another; that the appellant accused his former group supervisor of favoritism towards the alleged wrongdoer; and that the alleged wrongdoer reported to the Assistant Special Agent in Charge that she felt unsafe around the appellant based on information that the appellant was arrested for a domestic incident. *See* IAF-W, Tab 34, subtabs 40, 49, 54. The initial decision does not reflect that the administrative judge considered this evidence.

¶31 Further, the administrative judge does not explain why, contrary to the appellant's assertions, a co-worker was not a similarly-situated non-whistleblower who, unlike the appellant, was reassigned to another division after exhibiting ongoing performance issues. *See* PFR File, Tab 1 at 17; 12/20 HT at 329-403; 12/22 HT at 863-865. The administrative judge solely focused upon whether a different co-worker, who resigned in lieu of being removed based on performance issues, was a similarly-situated non-whistleblower. *See* ID at 11.

¶32 As set forth above, the initial decision does not reflect that the administrative judge's clear and convincing analysis was based on all of the evidence, considered as a whole. To conduct a *Whitmore* analysis will require further fact finding, including credibility determinations. The administrative judge is in the best position to make these determinations. *See Taylor v. Department of Homeland Security*, 107 M.S.P.R. 306, ¶ 13 (2007). Thus, we remand the appeal further consideration. *See Massie v. Department of Transportation*, 118 M.S.P.R. 308, ¶ 8 (2012) (remanding the appeal for the administrative judge to reconsider the record evidence and make detailed findings consistent with the guidance provided by the court in *Whitmore*).

¶33 On remand, the administrative judge shall determine whether the agency has met its burden to show by clear and convincing evidence that it would have taken the personnel actions, even absent the appellant's protected disclosure. In analyzing this issue, the administrative judge shall analyze each of the *Carr* factors as they pertain to the continuum of performance related actions and the appellant's non-selection for lateral transfers for which he applied. The administrative judge shall, consistent with the guidance provided by the court in *Whitmore*, reconsider the record as a whole and make thorough and reasoned findings that address both the evidence supporting his conclusions and the countervailing evidence.

We affirm the administrative judge's findings that the agency's recommendation to the appellant that he undergo a psychiatric examination was a personnel action under 5 U.S.C. § 2302(a)(2)(A)(x).

¶34 The agency argues on review that the administrative judge erred in finding that its recommendation that the appellant undergo a psychological examination constituted a personnel action under 5 U.S.C. § 2302(a)(2) because a mere recommendation to an employee to undergo a psychological examination is not a justiciable action under the WPA. PFR File, Tab 3 at 22-24. The WPA provides that "a decision to order psychiatric testing or examination" is included under the definition of "personnel action." 5 U.S.C. § 2302(a)(2)(A)(x). The Board has found that this provision covers not only direct order, but also language that may be associated with offers or recommendations when the agency further related that declination of the offer would result in consideration of disciplinary action. *Diefenderfer v. Department of Transportation*, 108 M.S.P.R. 651, ¶ 31 (2008). Thus, the Board has recognized that an implicit order to undergo a psychiatric examination, particularly when accompanied by a threat of repercussions if an offer or recommendation is declined, is within the scope of 5 U.S.C. § 2302(a)(2)(A)(x). *Id.*

¶35 Here, the appellant alleged in his petition for appeal that, in reprisal for making his protected disclosures, the Special Agent in Charge and Associate Special Agent in Charge recommended that he undergo a psychological examination. IAF-W, Tab 1 at 52. Specifically, the appellant alleged that in the presence of four other management officials, the Special Agent in Charge said, "since you are not an agent I cannot mandate you into getting a psychological exam, but I am strongly recommending that you get one." *Id.* The appellant further alleged that he was treated in a demeaning, threatening and intimidating manner when he subsequently declined the offer to undergo a psychological examination. *Id.* The appellant also testified at hearing that he perceived the Special Agent in Charge's recommendation to be more than a mere offer. IAF-W, HT 12/20 at 383-88. The administrative judge determined that the Special Agent in Charge's action constituted a "personnel action" under the WPA, and we see no reason to disturb his finding on this issue. ID at 6.

ORDER

¶36 Accordingly, we AFFIRM, in part, and VACATE, in part, the initial decision in MSPB Docket No. CH-1221-11-0466-W-1, and REMAND the appeal for further adjudication. We also REOPEN MSPB Docket No. CH-0432-11-0182-I-1, and REMAND that appeal for further adjudication consistent with this Opinion and Order. In his discretion, the administrative judge may join the appeals for consideration under 5 C.F.R. § 1201.36(a)(2). The administrative judge should afford the parties the opportunity to submit additional evidence and argument, including ordering a supplemental hearing, if necessary, to adjudicate

the issues on remand. In the Remand Initial Decision, the administrative judge may incorporate by reference the findings and determinations of the initial decision affirmed by this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.